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Mahari bin Endut v Dato' Hj Mat Razali bin Kassim & Ors

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FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(F)–21 OF 2008(T)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), AUGUSTINE PAUL AND ZULKEFLI FCJJ
28 MAY 2009

C

Election — Petition — Amendment — Application to amend made at submissions stage — Whether application ought to be allowed

D

Election — Petition — Defective petition — Strict requirement to state briefly facts and ground relied upon to sustain prayers sought — Rationale for such strict requirement

E

Election — Petition — Trial of election petition — Respondents to be informed of charges against them

F

At the 12th General Elections, the third respondent was returned as the duly elected candidate of the Terengganu State Constituency of N15, Ladang with a 31-vote majority. The appellant — a registered voter of N15 — filed an election petition alleging, inter alia, various non-compliances and contraventions of law within the meaning of s 32(b) of the Election Offences Act 1954 ('Act 5'). In essence, the appellant's case was that the first and

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second respondents were negligent when marking and/or sorting postal ballot papers resulting in a rejection of 127 postal votes. The appellant thus prayed, inter alia, for a scrutiny and/or recount of the 127 rejected postal votes. The appellant's petition was however dismissed by the High Court sitting as an election court. The appellant thus appealed to the Federal Court.

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Held, dismissing the appeal with costs:

I

(1) In election cases, strict compliance with the provisions of Act 5, Regulations and/or Rules is required otherwise any election petition would be rendered defective and liable to be struck out in limine. Thus, under r 4(1)(b) of the Election Petition Rules 1954 it is mandatory that an election petition state briefly the facts and grounds relied upon to sustain the prayers sought for. Briefly put, the rationale for this strict

requirement is that the right conferred by Act 5 is a special kind of right created by a special law and it thus must be subject to the limitations imposed on it (see para 16). *Tengku Korish v Muhamad Jusoh* [1970] 1 MLJ 6 followed. A

(2) It is also essential for the respondents in election petitions to be informed of the charges against them. Once informed they have to be given time to collect their evidence while such evidence is still fresh and available and to prepare their cases (see para 17). *Mohamed bin Bakar v Abdul Rashid bin Othman & Anor* [1980] 1 MLJ 167 referred. B

(3) Although the election judge was of the view that the election petition in the instant case failed to comply with the Petition Rules 1954, the issue was not strictly due to non-compliance with the Petition Rules 1954. In the instant case, the appellant had failed to prove his case and for this reason alone the appeal ought to be dismissed (see paras 18, 19 & 23). C D

(4) The elections judge was correct in refusing to allow the appellant to amend his election petition at the submissions stage. Allowing the amendment at the submission stage would have given the appellant an undue advantage over the respondents, let alone surprise. It would have meant that the appellant could then rely on the evidence adduced while the respondents would have focused only on the unamended pleaded case when such evidence was adduced (see paras 24 & 27). E

(5) The election judge did in fact consider the overall evidence adduced and conclude that he was inclined to believe the version of the witnesses called by the respondents. Such approach should satisfy the requirement on the burden of proof. The election judge made a finding of fact after due deliberation and appreciation of all the evidence adduced by all the parties. It could not be said that his conclusion was so perverse that it justified appellate intervention (see paras 36–37). F G

(6) Although the appellant had raised the doctrine of res ipsa loquitur, the election judge had correctly rejected the applicability of such doctrine. The facts in the instant case did not satisfy the conditions for the doctrine to apply as the election judge came to his findings based on the evidence adduced (see paras 39 & 41). H

(7) In the instant case, only three postal votes could be said to have been erroneously rejected, that is, two postal votes on the ground of missing serial numbers of the postal ballot papers on envelope A and 1 postal vote due to its serial number being different from the serial number written on the envelope A. These reasons were not within those stated in the Elections (Postal Voting) Regulations 2003. However, the three postal votes could not override the 31-vote majority secured by the third respondent (see para 64). I

A (8) The effect of the deletion of s 40(3) of the Act 5 read with s 41 provides finality in an election process. Common law and equity principles have no application when determining election petition cases (see paras 74–75).

B **[Bahasa Malaysia summary**

Pada pilihan raya umum ke-12, responden ketiga pulang sebagai calon yang dipilih bagi kawasan N15, Ladang, Negeri Terengganu dengan majoriti undi 31. Perayu — pengundi berdaftar N15 — memfailkan satu petisyen pilihan
C raya mendakwa, antara lain, pelbagai ketakpatuhan dan pelanggaran undang-undang terangkum dalam maksud s 32(b) Akta Kesalahan Pilihanraya 1954 ('Akta 5'). Pada dasarnya, kes perayu adalah bahawa responden pertama dan kedua telah cuai apabila menanda dan/atau mengasing-asingkan kertas undi pos menyebabkan penolakan 127 undi pos.
D Oleh itu perayu merayu, untuk siasatan dan/atau pengiraan semula 127 undi pos yang telah ditolak. Walau bagaimanapun, petisyen perayu ditolak oleh Mahkamah Tinggi yang bersidang sebagai mahkamah pilihan raya. Oleh itu perayu merayu ke Mahkamah Persekutuan.

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Diputuskan, menolak rayuan dengan kos:

(1) Dalam kes-kes pilihan raya, peruntukan Akta 5, Peraturan-Peraturan dan/atau Kaedah-Kaedah perlu dipatuhi atau sebarang petisyen pilihan
F raya dianggap rosak dan bertanggungan untuk dibatalkan in limine. Oleh itu, di bawah k 4(1)(b) Kaedah-Kaedah Petisyen Pilihanraya 1954 adalah mandatori bahawa petisyen pilihan raya menyatakan secara ringkas fakta-fakta dan alasan-alasan yang digunakan untuk membenarkan rayuan yang dipohon. Secara ringkasnya, rasional bagi
G syarat-syarat yang ketat ini ialah bahawa hak-hak yang dinyatakan oleh Akta 5 merupakan hak istimewa yang dicipta oleh undang-undang khas dan oleh itu ia termaktub kepada batasan-batasan yang dikenakan ke atasnya (lihat perenggan 16). *Tengku Korish v Muhamad Jusoh* [1970] 1 MLJ 6 diikut.

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(2) Adalah penting bagi responden-responden dalam petisyen pilihan raya untuk dimaklumkan mengenai tuduhan ke atas mereka. Apabila mereka sudah dimaklumkan mereka diberikan masa untuk mengumpulkan keterangan mereka apabila keterangan tersebut masih
I baru dan tersedia dan untuk menyediakan kes mereka (lihat perenggan 17). *Mohamed bin Bakar v Abdul Rashid bin Othman & Anor* [1980] 1 MLJ 167 dirujuk.

(3) Walaupun hakim pilihan raya berpandangan bahawa petisyen pilihan raya dalam kes ini gagal untuk mematuhi Kaedah-Kaedah Petisyen

1954, isu tersebut bukanlah mengenai ketakpatuhan Kaedah-Kaedah Petisyen 1954. Dalam kes ini, perayu telah gagal untuk membuktikan kesnya dan berdasarkan alasan ini sahaja rayuannya perlu ditolak (lihat perenggan 18, 19 & 23).

(4) Hakim pilihan raya betul dalam menolak untuk membenarkan perayu untuk meminda petisyen pilihan rayanya pada peringkat penghujahan. Dengan membenarkan pindaan pada peringkat penghujahan akan memberikan perayu faedah tak wajar ke atas responden-responden, apatah lagi kejutan. Ini bermaksud bahawa perayu boleh bergantung kepada keterangan yang dikemukakan manakala responden-responden hanya memfokuskan kepada kes yang diplid yang belum dipinda apabila keterangan tersebut dikemukakan (lihat perenggan 24 & 27).

(5) Hakim pilihan raya telah mempertimbangkan keterangan secara keseluruhannya dan menyimpulkan bahawa dia cenderung untuk mempercayai versi saksi-saksi yang dipanggil oleh responden-responden. Pendekatan tersebut perlu memenuhi syarat-syarat atas beban pembuktian. Hakim pilihan raya membuat satu dapatan fakta selepas mempertimbangkan dan mendalami semua keterangan yang dikemukakan oleh semua pihak. Kesimpulan yang dibuat olehnya tidak boleh dikatakan terpesong sehingga membolehkan campur tangan mahkamah rayuan (lihat perenggan 36–37).

(6) Walaupun perayu telah membangkitkan doktrin res ipsa loquitur, hakim pilihan raya telah secara betul menolak penggunaan doktrin tersebut. Fakta dalam kes ini tidak memenuhi syarat-syarat untuk doktrin tersebut digunakan memandangkan hakim pilihan raya membuat keputusan berdasarkan keterangan yang dikemukakan (lihat perenggan 39 & 41).

(7) Dalam kes ini, hanya tiga undi pos yang dikatakan ditolak secara salah, iaitu, dua undi pos atas alasan kehilangan nombor siri kertas undi pos atas sampul surat A dan satu undi pos kerana nombor sirinya berlainan dengan nombor siri yang tertulis atas sampul surat A. Sebab-sebab tersebut tidak dinyatakan dalam Peraturan-Peraturan Pilihanraya (Pengundian Pos) 2003. Walau bagaimanapun, ketiga-tiga undi pos tersebut tidak boleh mengatasi majoriti undi yang diperoleh oleh responden ketiga (lihat perenggan 64).

(8) Kesan pemotongan s 40(3) Akta 5 dibaca dengan s 41 memberikan kemuktamadan dalam proses pilihan raya. *Common law* dan prinsip-prinsip ekuiti tidak boleh digunakan apabila menentukan kes-kes petisyen pilihan raya (lihat perenggan 74–75).]

Notes

For a case on trial of election petition, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) para 2065.

A For cases on amendment, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2004–2005.

For cases on defective petition, see 6 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2022–2023.

B **Cases referred to**

Albert Joseph Arzu v Allan Edmund Arthurs & Anor [1965] 1 WLR 675, SC (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517, FC (refd)

C *Dato' Ismail bin Kamus v Pegawai Pengurus Pilihan Raya (Zainal Abidin bin Azim) & Ors* [2005] 3 MLJ 193; [2005] 2 CLJ 237, FC (refd)

Goonesinha v Hon CI de Kretser [1945] AC 63, SC (refd)

Mohamed bin Bakar v Abdul Rashid bin Othman & Anor [1980] 1 MLJ 167, HC (refd)

D *Mohd Nor bin Ismail v Mohd Zain bin Abdullah & Anor* [1988] 2 MLJ 384, HC (refd)

Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465, FC (refd)

Ponnuswami v Returning Officer, Nammakkal Constituency & Ors [1952] SCR
E 218 (refd)

Tengku Korish v Muhamad Jusoh [1970] 1 MLJ 6, HC (folld)

Theberge v Laudry (1876) 2 App Cas 102 (refd)

Legislation referred to

F Election Offences Act 1954 ss 32(b), 35(c), 36, 38, 38(2), 40(1)(a), (b), (c), (d), (e), (f), (3), 41

Election Petition Rules 1954 r 4(1)(b)

Elections Act 1958

Elections (Conduct of Elections) Regulations 1981 regs 17, 19, 21, 25,
G 25(7), (d), (10), 25C, 25C(1), (2), 25D, 26

Elections (Postal Voting) Regulations 2003 regs 2, 7, 8, 12, 15, 15(3), (9), (10), 16, 17

H **Appeal from**: Election Petition No 01 of 2008 (High Court, Kuala Terengganu)

Muhammad Shafee Abdullah (Badrul Munir Bukhari with him) (Shafee & Co) for the appellant.

I *Kamaluddin Said (Azizan Arshad, Habibah Harun and Rafiah Aziz with him) (Attorney General's Chambers) for the first and second respondents.*

Wan Abd Muttalib bin Embong (Radzi bin Mustafa, Abd Haris bin Abd Malik, Saiffudin bin Othman, Mohd Kamaruzaman bin Abd Wahab and Zulqamain bin Lokman with him) (Wan Abd Muttalib & Co) for the third respondent.

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):

[1] On 8 March 2008 Malaysia held her 12th General Election both for the Parliamentary and State Assemblies seats.

[2] In the State constituency for N15 Ladang, Terengganu, the candidates who stood for election were Dato' Wan Hisham bin Wan Salleh for the Barisan Nasional and Dato' Tengku Hassan bin Tengku Omar, the third respondent for PAS.

[3] Upon completion of the counting of the votes cast including the postal votes the third respondent was returned as the duly elected candidate with 31 votes majority.

[4] By election petition dated 27 April 2008 the appellant (the petitioner in the court below and a registered voter and who voted in the State Constituency N15 Ladang) prayed for several relief, namely:

(i) that a scrutiny and/or recount of the 127 rejected postal votes at sorting stage be granted on the ground that Dato' Wan Hisham had a majority of the lawful votes;

(ii) that it might be determined that the said Dato' Tengku Hassan bin Tengku Omar was not duly elected or returned and that the said election was void;

(iii) that Dato' Wan Hisham was duly elected and ought to have been returned;

(iv) that a determination and certification as provided under s 36 of the Election Offences Act 1954 be given;

(v) that the petitioner may have such further or other relief as may be just; and

(vi) costs.

It is to be noted that the key request by the appellant is for the grant of the order of scrutiny and/or recount of the *127 postal votes* rejected at sorting stage.

[5] The main allegations submitted to support the petition are as follows:

(i) there was non-compliance with and/or contraventions of the law within the meaning of s 32(b) of the Election Offences Act 1954 *where the voting was not carried out according to the principles of the law, rules and*

regulations stipulated, inter alia, the Elections (Postal Voting) Regulations 2003 ('the Postal Voting Regulations 2003'), the Elections (Conduct of Election) Regulations 1981 ('the Conduct of Election Regulations 1981'), the Elections Act 1958 ('the EA 1958') and the Election Offences Act 1954 ('Act 5');

(ii) due to the negligence in the conduct of marking the postal ballot papers including the envelopes A and Forms 2 (statutory declarations) it had resulted in the unlawful rejection of postal votes. The agents and/or officers of the first and second respondents had breached, inter alia, reg 7 of the Postal Voting Regulations 2003;

(iii) the first respondent and/or second respondent had failed to comply with, inter alia, regs 2, 7, 8, 12, 15, 16 and 17 of the Postal Voting Regulations 2003, regs 17, 19, 21, 25, 25C and 25D of the Conduct of Elections Regulations 1981 and the EA 1958;

(iv) that due to the non-compliance with the law and/or contraventions, the voting was not carried out in accordance with the principles and Rules and Regulations stipulated in the Postal Voting Regulations 2003, the Conduct of Election Regulations 1981, the EA 1958 and the Act 5 and the result of the election was thereby affected as envisaged under s 32(b) of the Act 5.

[6] Simply put, it is the case for the appellant that the agents and/or officers of the first and/or second respondents failed to write down and/or were negligent when marking the postal ballot papers at the time of issuance and erred during the sorting stage of the postal ballot papers. As a result 127 of the postal votes were unlawfully rejected thereby affected the result as envisaged under s 32(b) of the Act 5. Dato' Wan Hisham would have been returned the winner if not for the rejection of those 127 postal votes since the third respondent only secured 31 votes majority.

[7] We are of the view that the allegations made by the appellant are facts sensitive.

[8] Learned counsel for the appellant submitted, inter alia, that the 127 postal votes were rejected at the sorting stage on the grounds as stated in the petition, namely:

(a) Box No 1 Group 1:

(i) BEFORE the opening of envelopes A: six postal votes were rejected. Reasons:

(a) two postal votes rejected due to the missing serial numbers of the ballot papers written on the envelopes A; and

(b) four postal votes rejected due to the missing serial numbers of the ballot papers in Form 2;

(ii) AFTER the opening of envelopes A: three postal votes were rejected.
Reasons:

(a) two postal votes were rejected as they were for a different constituency; and

(b) one postal votes were rejected as its serial number did not match with the serial number written on the envelope A.

(b) Box No 2 Group 2:

(i) BEFORE the opening of envelopes A: 80 postal votes were rejected.
Reasons:

(a) 79 postal votes were rejected as they did not have serial numbers in the Form 2; and

(b) one postal vote was rejected as it had no signature of the witness in the Form 2;

(ii) AFTER the opening of envelopes A: five postal votes were rejected.
Reasons:

(a) four postal votes were for the Parliamentary constituency of Kuala Terengganu; and

(b) one postal vote did not have its serial number matching with the serial number written on the envelope A.

(c) Box No 3 Group 3:

(i) BEFORE the opening of envelopes A: 33 postal votes were rejected.
Reasons:

(a) three of the Form 2 did not have the signatures of the voters;

(b) two of the Form 2 did not have the witnesses' signatures;

(c) one of the Form 2 did not have the witness's particulars;

(d) one postal vote did not have the corresponding serial number between its envelope A and Form 2; and

(e) 22 postal votes did not have the serial numbers in their Form 2.

(ii) AFTER the opening of envelopes A: four postal votes were rejected.

Reasons:

(a) two Parliamentary postal votes were found inside envelopes A; and

(b) two postal votes did not have their serial numbers matching with the serial numbers written on their envelopes A.

(Emphasis added.)

[9] It was therefore submitted that the rejection or the reasons for the rejection amounted to non-compliance with the relevant election laws thereby justifying the granting of the relief prayed for in the petition.

[10] By notice of motion dated 9 June 2008 made under reg 26 of the Conduct of Elections Regulations 1981 the appellant applied for an order that the postal ballot papers, Form 2 and envelopes A in Box No 1 Group 1, Box No 2, Group 2, and Box No 3, Group 3 which were referred to in the petition be inspected, copied or produced seven days before the trial date of the petition at a time and place deemed fit and reasonable by the election court.

[11] However, when the notice of motion came up for hearing the learned election judge did not proceed to hear it. He was of the view that it was premature to do so and that he would make the necessary ruling during the trial proper.

[12] The hearing of the petition commenced from 14 July 2008 and completed on 19 August 2008. On 22 September 2008 the election court dismissed it with costs.

[13] Basically, the grounds for dismissal are:

(i) the mandatory provision of r 4(1)(b) of the Election Petition Rules 1954 was not complied with in that the petition failed to plead the proper ground and material fact, namely, the issuance of postal ballot papers on 28 February 2008 and hence no cause of action was disclosed thereby warranting its dismissal;

(ii) that the oral application made by the appellant at the submission stage to amend the petition to include the date 28 February 2008 could not be allowed as it was prejudicial to the respondents and payment of costs

would not be adequate to compensate them. Further, the application was made out of time as stipulated under s 38 of the Act 5;

(iii) that even if the relevant material fact was before the election court the evidence adduced by the appellant could not be accepted to support the assertion that objections were made by the agents of Dato' Wan Hisham during the marking process of the postal ballot papers and during the sorting stage of the postal ballot papers. Such assertion appeared to be more of an afterthought due to the narrow majority won by the third respondent;

(iv) that the appellant failed to prove on the balance of probabilities the allegation that the respondents did not comply with the relevant provisions of the written laws relating to the conduct of the election. As such s 32(b) of the Act 5 could not be relied upon;

(v) that under s 41 of the Act 5 and reg 25(10) of the Conduct of Elections Regulations 1981 the decision by the assistant returning officer to reject the 127 postal votes was final and could not be questioned;

(vi) that the election court has no longer the power to grant prayer (iii) namely, that Dato' Wan Hisham was elected and should be returned as the winner since s 35(c) of the Act 5 had been repealed; and

(vii) that the order for scrutiny relief prayed for by the appellant could not be granted since none of the circumstances as provided for under s 40(1)(a)–(f) of the Act 5 had been satisfied.

[14] Dissatisfied with the decision of the learned election judge, the appellant now appeals before us.

[15] Briefly, the issues raised are related to the question of whether the election judge was correct in his grounds for dismissing the petition.

PLEADINGS IN ELECTION CASES

[16] In election cases the principles on pleadings are well settled. Strict compliance with the provisions of the Act 5, Regulations and/or Rules is required otherwise any election petition would be rendered defective and liable to be struck out in limine. Thus, under r 4(1)(b) of the Election Petition Rules 1954 ('the Petition Rules 1954') it is mandatory that an election petition shall state briefly the facts and grounds relied upon to sustain the prayers sought for. The rationale for this strict requirement is that the 'the right conferred by that Act is a special kind of right unknown to the common law or equity, and the court which administers it possesses a special kind of jurisdiction (see *Theberge v Laudry* (1876) 2 App Cas 102, *Goonesinha v Hon CI de Kretser* [1945] AC 63 or what is said in *Albert Joseph*

A *Arzu v Allan Edmund Arthurs & Anor* [1965] 1 WLR 675 as a peculiar jurisdiction). It is not a civil right but a creature of statute or special law and must be subject to the limitations imposed by it (see *Ponnuswami v Returning Officer, Nammakkal Constituency & Ors)* [1952] SCR 218'. per Raja Azlan Shah J (as His Royal Highness then was) in *Tengku Korish v Muhamad Jusoh*
B [1970] 1 MLJ 6.

[17] It is also essential for the respondents in election petitions to be informed of the charges against them. Once informed they have to be given time to collect their evidence while such evidence are still fresh and available
C and to prepare their cases (see *Mohamed bin Bakar v Abdul Rashid bin Othman & Anor* [1980] 1 MLJ 167).

[18] In the present case the learned election judge was of the view that the petition failed to comply with r 4(1)(b) of the Election Petition Rules 1954
D and hence the appellant failed to prove his claim. Such conclusion stemmed from the failure by the appellant to state in the petition that there was an issuance of postal ballot papers on 28 February 2008. In fact the witnesses (Ali bin Endut — PW2; Ahmad Fairuz bin Mohamad — PW3 and Ismail
E Mohamad — PW6) called by the appellant to testify only made reference to 28 February 2008.

[19] With respect, in our view, it is not strictly on non-compliance with the Election Petition Rules 1954. Otherwise the petition should have been struck
F out without the need for a trial. It was more on the failure by the appellant to prove his case. He asserted that the postal ballot papers were issued on 3 March 2008 and 4 March 2008 which dates none of his witnesses made any reference. They only mentioned 28 February 2008 which the learned election judge noted as a fact.

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[20] The resultant effect is that the allegations made in the petition against the first and second respondents in connection with the issuance of the postal ballot papers on 3 March 2008 and 4 March 2008 remained unproved. Meanwhile, whatever happened on 28 February 2008 as narrated by the
H witnesses for the appellant during the hearing of the petition, including the assertion of having made their objections during the issuance of the postal ballot papers were quite irrelevant since the appellant did not plead such fact. It could therefore be inferred that the appellant had no complaint against whatever transpired during the issuance of the postal ballot papers on
I 28 February 2008.

[21] Since the learned election judge found and accepted that the witnesses called by the appellant only made reference to 28 February 2008 and that being a finding of fact, we, as the appellate court, should be slow in

interfering or reversing it (see *Dato' Ismail bin Kamus v Pegawai Pengurus Pilihan Raya, Zainal Abidin bin Azim & Ors* [2005] 3 MLJ 193; *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465). A

[22] It was contended before us that the date of 28 February 2008 was not a crucial and material fact. B

[23] With respect, whether it is crucial and material is not the issue. The important point is that the respondents should be informed of when and what allegations they had to answer. In this case the witnesses called by the appellant only made reference to 28 February 2008 and not the other dates as pleaded. As such the appellant had failed to prove his case. Hence for this reason alone this appeal should be dismissed. C

[24] We note that learned counsel for the appellant did apply orally to the learned election judge to amend the petition at the submission stage. It was refused on the grounds, inter alia, that it was out of time. D

[25] With respect we think the reference to time limitation by the learned election judge was misplaced in this case. Time limitation to amend an election petition is relevant where there is an allegation of corrupt practice made and not any kind of amendment (see s 38(2) of the Act 5). It has been held that the 'criteria for amendment for such cases must in addition to the expressed provisions of the election laws be considered in the light of the principles on amendment as judicially practised in all applications under the rules of court, ie it will not embarrass, prejudice or cause any injustice to the other party' per Wan Yahya J (as he then was) in *Mohd Nor bin Ismail v Mohd Zain bin Abdullah & Anor* [1988] 2 MLJ 384. E F G

[26] In this case however, the refusal was appropriate. The respondents would have been unduly prejudiced simply because throughout the hearing before the submission stage the pleaded case of the appellant differed from what were said by his witnesses. Yet he or his counsel did nothing. It would therefore be quite reasonable to assume that the respondents would have taken note of the disparity between the pleaded case and the evidence adduced and hence would have conducted their defence during the hearing on such footing. H

[27] Allowing the amendment at the submission stage would have given the appellant undue advantage over the respondents, let alone surprise. It would have meant that the appellant could then rely on the evidence adduced while the respondents would have focused only on the unamended pleaded case when such evidence were adduced. I

A OTHER FINDINGS OF FACTS BY THE LEARNED ELECTION JUDGE

[28] Despite his earlier finding that the material fact was not pleaded, the learned election judge went on to consider the evidence adduced by all the parties, including the oral testimonies of all the witnesses called.

[29] The key witnesses (PW2, PW3 and PW6) called by the appellant testified that they were only observers during the issuance of the postal ballot papers on 28 March 2008. They saw Clerks No 3 of the second respondent writing on the documents received from Clerks No 2 although they did not see what were actually written down. They said that being mere observers they could not raise any objection during the process. That of course did not stop PW3 from objecting which was subsequently sustained when the representative of the rival candidate requested the clerk of the second respondent not to issue a postal ballot paper for a voter who was out of the country.

[30] The witnesses of the respondents stated quite the opposite to what were said by the witnesses of the appellant. For instance Clerks No 3 (DW1 — Puan Zetti Akhtar bt Yusof and DW3 — Rosmawi Omar) tasked in writing down the serial numbers of the postal ballot papers on the Form 2 and envelopes A testified that they did their work as expected of them. DW2 — Abd Rahim Zainal Abidin was the Clerk No 4 and he was responsible for putting the issued postal ballot papers inside the envelopes A together with the Form 2 into the envelopes B. He testified that he did not see any Form 2 which did not have the serial number written on it. DW4 — Zamri bin Abd Rahman was the other Clerk No 4 during the issuance of postal ballot papers. This witness also said that there was no objection received from any of the agents of the candidates.

[31] The other witnesses of the respondents namely, DW8 — Hamzah bin Ngah and DW9 — Aziz bin Sidek, testified that they saw Clerks No 3 writing on the documents passed to them by Clerks No 2. DW5 — Noratini Abd Ghafor @ Sulaiman (the counting clerk for postal votes), DW6 — Ahmad bin Endut (the counting clerk for postal votes), DW7 and DW9 (the counting agent for PAS) all said that they could not recall any objection raised by the agents of the appellant during the sorting stage of the postal ballot papers.

[32] After considering the evidence as a whole the learned election judge was inclined to believe the version of the respondents. He found their evidence more credible. He accepted the argument that once the postal ballot papers were sent to the postal voters they were no longer within the control

of the second respondent. He highlighted the fact that the serial numbers of the postal ballot papers were written in pencil on the Form 2. A

[33] It was not in dispute that during the sorting stage of the postal ballot papers those defects as pleaded in the petition were found. However, the blame should not be on the first and second respondents by default. The explanation given by DW7 the assistant returning officer should be duly considered. B

[34] In his evidence DW7 said that after the postal ballot papers were sent via courier services to the postal voters he did not know what happened to them. All that could be done was to wait for their return on or before 5pm on 8 March 2008 which was the polling day of the general election. In our view the explanation is reasonable and plausible given the system upon which the second respondent operates. C D

[35] It could be argued that the burden of proof shifted to the first and second respondents to establish that they had complied with the requirements of the relevant election laws, regulations and rules. E

[36] While the learned election judge did not expressly deal with such issue he did in fact considered the overall evidence adduced and concluded that he was inclined to believe the version of the witnesses called by the respondents. In our view such approach should satisfy the requirement on the burden of proof. It would have been otherwise if he had just considered the testimonies of the witnesses called by the appellant in deciding whether there was failure and/or negligence by the first and second respondents in not complying with the election laws, rules and regulations in the conduct of the election for the State Constituency N15 Ladang. F G

[37] We are therefore in agreement with the conclusion of the learned election judge. He made a finding of fact arrived at after due deliberation and appreciation of all the evidence adduced by all the parties. We have carefully perused the appeal record and we are unable to say that the conclusion is perverse which justify our intervention (see *China Airlines Ltd v Maltran Air Corp Sdn Bhd* [1996] 2 MLJ 517). H

[38] Since the learned election judge accepted as a fact that the Clerks No 3 of the second respondent did what were required of them the question of failure and/or negligence on their part and thus the first and second respondents vicariously liable should not arise. The same conclusion also negates the assertion by the appellant that the voting was not carried out according to the election laws, rules and regulations applicable. I

[39] The doctrine of res ipsa loquitur was also canvassed by learned counsel for the appellant in order to buttress his argument. The learned election judge rejected the applicability of such doctrine on the basis that he accepted the version of the witnesses called by the respondents.

[40] It may be beneficial to recall that the 'expression res ipsa loquitur does not state any principle of law'. The doctrine applies '(1) when the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control; (2) the occurrence is such that it would not have happened without negligence. If these two conditions are satisfied it follows, on a balance of probability, that the defendant, or the person for whom he is responsible, must have been negligent. There is, however, a further negative condition; (3) there must be no evidence as to why or how the occurrence took place. If there is, then appeal to res ipsa loquitur is inappropriate, for the question of the defendant's negligence must be determined on that evidence' (see *Clerk and Lindsell on Torts* (12th Ed) in para 796).

[41] The facts in the present case do not satisfy the conditions for the doctrine to apply particularly since the learned election judge came to his finding based on the evidence adduced.

SECTION 25(7) OF THE CONDUCT OF ELECTION REGULATIONS 1981

[42] In the course of argument reg 25(7) of the Conduct of Election Regulations 1981 came to our attention. It reads:

> (7) The Presiding officer shall reject as invalid the following ballot papers only, namely, any ballot paper
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> (a) which is not stamped or perforated with the official mark, or initialled by the presiding officer;
>
> (b) on which votes are given for more than one candidate;
>
> (c) on which anything is written or marked by which the voter can be identified;
>
> (d) which is unmarked or marked other than in the place or manner provided; or
>
> (e) which does not clearly indicate the intention of the voter:

> Provided that if a presiding officer is satisfied that such ballot paper was issued in a state which would render it invalid under this regulation owing to some act or omission by him or a person acting under his authority, and if the ballot paper is otherwise valid, the presiding officer shall not reject such ballot paper.

[43] The relevant portions of the regulation for consideration are para (d) and the proviso. Hence, we asked learned counsel for the parties on the effect of the proviso based on the following undisputed facts, namely:

(i) that 127 postal votes were rejected by DW7 the assistant returning officer at the sorting stage on account of the defects as pleaded in the petition; and

(ii) that Clerks No 3 of the second respondent were assigned to write down the serial numbers of the postal ballot papers on the Form 2 and the envelopes A during the issuance.

[44] We also requested learned counsel for the appellant to address us on whether the pleadings as found in the petition covered the issue under consideration.

[45] He replied by referring to pp 125–131 of the appeal record in particular para 10 which reads (verbatim):

> 10. The first respondent and /or second respondent had failed to comply with inter alia Regulations 2, 7, 8, 12, 15, 16 and 17 Elections (Postal Voting) Regulations 2003, Regulations 17, 19, 21, 25, 25C and 25D of the Elections (Conduct of Elections) Regulations 1981 and The Elections Act 1958.

[46] At the same time learned counsel for the appellant admitted that the petition was anchored on s 32(b) of the Act 5.

[47] Admittedly the issue has aroused our anxious consideration. Accordingly after we reserved our judgment earlier on 7 January 2009 we found it necessary to recall learned counsel for the parties to further answer and submit on our specific queries related to the issue.

[48] In his further submissions on 27 March 2009 learned counsel for the appellant submitted the following points:

(a) that the mere absence of the serial numbers in Form 2 should not result in the rejection of the postal votes;

(b) that the crucial word to note should be 'marking' as found in reg 7 of the Postal Voting Regulations 2003 and reg 25(7)(d) of the Conduct of Election Regulations 1981;

A (c) that even DW7 the assistant returning officer used the word 'technical' after seeing the Form 2 and the envelopes A. The absence of the serial numbers in these two documents should have led DW7 to carry out a two-stage enquiry, namely, whether the postal ballot papers were unmarked and whether the proviso to reg 25(7) saved the postal votes. In this case no enquiry was done; and

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(d) that 'ballot paper' referred to in reg 25(7) should include Form 2, envelope A and other accompanying documents.

C **[49]** Learned senior federal counsel appearing for the first and second respondents submitted that only s 32(b) of Act 5 was pleaded and not as to how DW7 the assistant returning officer rejected those postal votes. He further contended that reg 25(7)(d) should not apply to postal voting.

D **[50]** Learned counsel for the third respondent maintained that the pleadings in the petition did not sufficiently disclose the allegation that there was non-compliance with the relevant election rules and regulations. He further supported the contention of learned senior federal counsel that reg 25(7) did not apply to postal voting.

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[51] No doubt the paragraphs in the petition referred to by learned counsel for the appellant make reference to reg 25 of the Conduct of Elections Regulations 1981. However, having carefully considered those paragraphs we are not persuaded that reg 25(7) was ever in the mind of the appellant when the petition was filed. It was not even an issue discussed or submitted by learned counsel for the parties before the election judge. Instead his attention was drawn on which of the two versions adduced by the witnesses called should be accepted. And as discussed above he preferred the version of the witnesses called by the respondents. In our view the acceptance of the version of the respondents made reg 25(7) quite irrelevant for consideration.

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[52] Moreover, to invoke the effect of the reg 25(7) at this appeal stage would be prejudicial and disadvantageous to the respondents as they would be taken by surprise. In fact even learned counsel for the appellant did not rely on it in the memorandum of appeal and as the main thrust in his written submissions before us. Further, we think it is quite unfair to deal with the issue at this appellate stage since the parties did not have the opportunity to deliberate and addressed it in depth before the learned election judge.

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[53] Thus, premised on the findings of facts as found by the learned election judge and which we agree, we are therefore of the view that the requirement of proviso to reg 25(7) has not been satisfied. Accordingly, the appellant could not rely on it to advance his case.

[54] Alternatively, on the facts of this case reg 25(7) is inapplicable. This is because the rejection of the 127 postal votes took place during the *sorting stage* of the postal ballot papers after receiving them from the postal voters (Emphasis added).

[55] The Postal Voting Regulations 2003 prescribes a comprehensive mode of dealing with and handling of postal ballots papers. Briefly the steps are as follows:

(a) it commences with the issuance process of the postal ballot papers by the returning officer for the constituency concerned, that is, the preparatory process which involves the marking of the postal ballot papers before sending them to the registered postal voters for the constituency in question. The documents dispatched to a postal voter are:

(i) one ballot paper;

(ii) Form 2;

(iii) envelope A; and

(iv) envelope B.

(b) Upon receipt of these documents a postal voter is to observe and do the necessary requirements as stated in the Form 2 for the purpose of identity before marking the ballot paper. On completion a postal voter is expected to put the marked ballot paper inside the envelope A. Thereafter, both the completed Form 2 and the envelope A are put inside the envelope B before sending it back to the returning officer concerned.

(c) Upon receipt of the envelope B the returning officer puts it inside a postal voters' ballot box sealed not only by the returning officer but also by the agents of the contesting candidates in order to prevent tempering.

(d) Notices are then issued to the agents of the contesting candidates informing them of the time and place for the opening of the postal voters' ballot box. It can be done even before the polling day of election so long as the returning officer ensures that there is at least one postal voters' ballot box for the receipt of envelope B up to five o'clock in the afternoon of polling day. This is the *sorting stage*, being the first stage of the process. The second stage is the actual counting of the postal votes. The returning officer has to observe carefully his tasks at this first stage as stipulated in the Postal Voting Regulations 2003. This is the stage when postal votes can be rejected without even opening envelope A to get the marked ballot papers. (Emphasis added.)

[56] The sorting stage is carried out as follows:

(a) Opening of covering envelope (envelope B)

Accepted	Rejected
(i) Where the number on the Form 2, duly signed and authenticated, agrees with the number on envelope A, the returning officer shall place the Form 2 in a separate receptacle and the envelope A in another receptacle. (ii) Where there is no envelope A or an envelope A has been opened under sub-reg 15(3), returning officer shall — (a) where the number on the Form 2, duly signed and authenticated, agrees with the number on the ballot paper, place the declaration in the receptacle for declarations of identity and the ballot paper in a ballot box previously shown open and empty to the agents present and locked by the returning officer and affixed with security tape and signed by the returning officer and the agents desiring to sign on the security tape; (iii) Where the number on the Form 2, duly signed and authenticated, does not agree with the number on an envelope or that envelope A has no number on it, the returning officer shall open the envelope and shall — (a) where the number on the Form 2 agrees with the number on the ballot paper, place the Form 2 in the receptacle for Form 2 and the ballot paper in the ballot box referred to in para (8)(a);	(i) An envelope B shall be marked 'rejected' — (a) if it does not contain both Form 2 and an envelope A; or (b) if it does not contain both Form 2 and a ballot paper. (ii) If an envelope B contains only an envelope A, the returning officer shall open envelope and if it is found not to contain Form 2, then the envelope B shall be marked 'rejected'. An envelope B marked 'rejected' together with its contents, if any, shall be placed in a separate receptacle. (iii) On opening an envelope B, other than an envelope referred to in sub-reg 15(3), the returning officer shall first satisfy himself that the Form 2 has been duly signed and authenticated and, if he is not so satisfied, he shall mark on the Form 2 'declaration rejected', attach to the Form 2 envelope A or, if there is no such envelope, the ballot paper, and place it in the receptacle for votes rejected. Before placing the Form 2 in the receptacle for votes rejected, the returning officer shall show the Form 2 to the agents and, if any objection is made by any agents to his decision, he shall add the words 'rejection objected to' on the Form 2. (iv) where the number on the Form 2 does not agree with the number on the ballot paper, mark on the Form 2 'vote rejected', attach to it the ballot paper and place it in the receptacle for votes rejected. (v) Where the number on the Form 2, duly signed and authenticated, does not agree with the number on an envelope or that envelope A has no number on it, the returning officer shall open the envelope and shall where the number on the Form 2 does not agree with the number on the ballot paper or there is no ballot paper, mark on the Form 2 'vote rejected', attach to it the ballot paper, if any, and place it in the receptacle for votes rejected.

(b) Opening of envelope A — Regulation 17

Accepted	Rejected
(i) Where the number on an envelope A agrees with the number on the ballot paper contained in the envelope, the returning officer shall place the ballot paper in the ballot box referred to in paragraph 15(8)(a) and shall put aside the envelope for immediate destruction.	(i) Where an envelope A does not contain a ballot paper, the returning officer shall mark on the envelope 'empty'. (ii) Where the number on an envelope A does not agree with the number on the ballot paper contained in the envelope, the returning officer shall mark on the ballot paper 'rejected' and attach the envelope A to it.

As can be noted above rejection of postal votes is done even at the sorting stage due to failure in complying with the stipulated requirements in the Postal Voting Regulations 2003.

[57] Regulation 15(10) of the Postal Voting Regulations 2003 made it very clear that except for the purposes of ascertaining under sub-reg (3) of reg 15 whether an envelope A contains a Form 2 or under sub-reg (9) of reg 15 whether the serial number in the Form 2 agrees with the serial number of the ballot paper, the returning officer shall not open envelope A before it is due to be opened under reg 17.

[58] Regulation 17 of the Postal Voting Regulations 2003 reads:

(1) After security tape has been affixed on the packets referred to in regulation 16, the returning officer shall open separately each envelope A placed in the receptacle for envelopes A.

(2) Where an envelope A does not contain a ballot paper, the returning officer shall mark on the envelope 'empty'.

(3) Where the number on an envelope A agrees with the number on the ballot paper contained in the envelope, the returning officer shall place the ballot paper in the ballot box referred to in paragraph 15(8)(a) and shall put aside the envelope for immediate destruction.

(4) Where the number on an envelope A does not agree with the number on the ballot paper contained in the envelope, the returning officer shall mark on the ballot paper 'rejected' and attach the envelope A to it.

(5) The returning officer shall put into separate packets the envelopes marked 'empty' and the ballot papers marked 'rejected' and shall affix security tape on the packets.

[59] Now, reg 25C(2) provides that reg 25, other than paras (3)(b), (4), (5) and (11), shall apply in relation to the counting of postal votes. However, such application only sets in at the time of counting of the postal votes and not during the sorting of the documents received from the postal voters. Regulation 25(7) together with its proviso does not apply at the sorting stage. It only comes into play at the counting of votes cast, that is, at the second stage in relation to postal voting process. This view is fortified by reg 25C(1) which makes reference to the conclusion of the proceedings under reg 17 of the Postal Voting Regulations 2003 (that is, the opening of envelope A) from which time the returning officer is mandated to make arrangements for the counting of postal votes.

[60] In other words in relation to the processing of postal votes the first stage (sorting stage) is governed by the Postal Voting Regulations 2003 while the second stage (counting stage) which is the actual counting of all the votes cast including the postal votes accepted after the sorting stage is governed by the Conduct of Elections Regulations 1981 in which reg 25(7) is found.

[61] Accordingly, our initial anxiety on the applicability of the proviso to reg 25(7) was quite unnecessary after all.

[62] In respect of contention that DW7 should have conducted an enquiry before rejecting the postal votes, we are of the view that at the sorting stage he was not obliged in law to do so. What was expected of him to do was only to comply with the provisions in the Postal Voting Regulations 2003 having no option but to follow the provisions thereof and to reject those defective documents received from the postal voters.

[63] We have also perused the reasons as stated in the petition for the rejection of the postal votes. In our view only 3 postal votes could be said to have been erroneously rejected, that is, two postal votes on the ground of missing serial numbers of the postal ballot papers on envelope A and 1 postal vote due to its serial number different from the serial number written on the envelope A. These reasons are not within those stated in the Postal Voting Regulations 2003. However, the three postal votes could not override the 31 votes majority secured by the third respondent.

OBJECTIONS AND FORM 15 (REGULATION 25C)

[64] In his judgment the learned election judge made reference to Form 15 and gave the impression that the mere presence of the signatures of the counting agents of the candidates in it indicated that there was no objection made and that they agreed with the conduct of the counting process including the final tally of the votes counted.

[65] With respect we are of the view that the impression portrayed in the judgment in relation to Form 15 is quite erroneous. There is nothing in Form 15 which allows such impression to arise. It is only the returning officer who is required to certify as correct the statement contained therein.

[66] Anyway in this case the learned election judge did make a finding of fact. He preferred the version of witnesses called by the respondents as their evidence were more consistent. He found that the testimonies of the witnesses called by the appellant were contradictory in that some said there were objections while the others stated otherwise.

[67] Further, the learned election judge was of the view that the issue of objection having been made was an afterthought since the appellant himself admitted in his testimony that he filed the petition due to the narrow victory margin of the other candidate. The admission according to the learned election judge gave an inference that the decision to file the election petition was made after the overall result was known for the State Constituency N15 Ladang.

[68] It is also in evidence that the witnesses called by the appellant did say that they could not object during the issuance of postal ballot papers for postal voters since they were only observers and had no right to object. Their task was only to watch what were done by the clerks of the second respondent.

[69] Hence, we do not think the finding of fact of the learned election judge is perverse of the evidence adduced thereby requiring our intervention.

SECTION 41 OF THE ACT 5 AND SCRUTINY

[70] Learned counsel for the appellant also argued that s 41 of the Act 5 is not an ouster clause and any rejection of postal votes should be exercised reasonably. He submitted that the principle of common law should be applied even in election cases.

[71] In his judgment the learned election judge held that the rejection of the 127 postal votes by the assistant returning officer was final and could not be questioned. He relied on s 41 of the Act 5 read with s 25(10) of the Conduct of Election Regulations 1981.

A **[72]** We asked learned senior federal counsel on the effect of the deletion of sub-s (3) of s 40 of the Act 5 in relation to the prayer for scrutiny by the appellant when addition of rejected votes could no longer be done.

B **[73]** The short answer given was that the deletion of the sub-s (3) read with s 41 provided finality in an election process. We agree.

C **[74]** The interpretation of the two sections may appear harsh. However, we are dealing with an election petition which is subject to strict interpretation of the relevant election laws (see *Dato' Ismail bin Kamus v Pegawai Pengurus Pilihan Raya (Zainal Abidin bin Azim)& Ors* [2005] 3 MLJ 193; [2005] 2 CLJ 237). Common law and equity principles have no application when determining election petition cases.

D CONCLUSION

[75] We have also considered the other arguments advanced by the parties in the course of submitting before us. Our view on each of them would not alter our conclusion in this appeal. Hence, we do not think it is necessary to address them specifically in this judgment.

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[76] Accordingly, for the foregoing reasons we are of the view that this appeal should be dismissed with costs. Deposit to be paid to the respondents to account for taxed costs.

F *Appeal dismissed with costs.*

Reported by Andrew Christopher Simon

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